MOTION FILED
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Nos. 99-1739 and 99-1745

IN THE

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Petitioner,

- and -

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Airports Council International – North America ("ACI-NA") hereby moves, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file a brief as amicus curiae in support of the petitions ("Petitions") for writ of certiorari, Nos. 99-1739 and 99-1745, to the United States Court of Appeals for the Fifth Circuit.

ACI-NA's members are the state, local and regional governing entities that own and operate commercial service airports in the United States and Canada. ACI-NA member airports serve more than 97 percent of the U.S. domestic scheduled air passenger and cargo traffic, and virtually all U.S. scheduled international air travel. Those members are directly impacted by the issues raised in the Petitions pertaining to the scope of federal preemption of the proprietary powers of airport owners and operators and thus ACI-NA is uniquely positioned to address those impacts and to aid the Court in considering the Petitions.

ACI-NA supports the Petitions, which seek review of a Fifth Circuit decision ("Decision") entered February 1, 2000, entitled *Dallas-Fort Worth International Airport et al. v. Department of Transportation* and reported at 202 F.3d 788 (5th Cir. 2000). That Decision wrongly concluded that the Airline Deregulation Act, currently codified at 49 U.S.C. § 41710 *et seq.* ("Deregulation Act"), preempted a contract, called a "use agreement," between the Dallas-Fort Worth International Airport Board, which owns and operates DFW International Airport, and a commercial airline, American Airlines, which provides service at DFW International Airport. The use agreement sets forth agreed-upon terms and conditions — including the space the airline was allowed to occupy exclusively and the rent charged for that space — under which the airline was entitled to use the airport's

facilities. The Fifth Circuit mistakenly concluded that a provision in the use agreement, by which American Airlines agreed to base certain interstate flights at DFW International Airport and not at nearby Love Field, was preempted since it had the effect of a local rule or regulation relating to "routes or services" which the Fifth Circuit decided was preempted by the Deregulation Act.

The Fifth Circuit's Decision contradicts earlier court decisions recognizing the validity of local political entities exercising, as airport owners and operators, proprietary powers to allocate efficiently the use of airport facilities, even where the exercise of such power impacts "routes or services." The Decision also contradicts this Court's reasoning in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). In *Wolens*, this Court concluded that an airline contract, freely entered into by the airline, which impacted "routes or services," was not preempted by the Deregulation Act.

ACI-NA believes the Decision merits review by the Court because the Decision would potentially harm most of the nation's commercial service airports, threatening the ability of airports to exercise their proprietary powers and to rely upon existing use agreements with airlines. It is through such contracts that airport proprietors efficiently allocate the use of their facilities among airlines. Moreover, the commitments set forth in such contracts aid airport proprietors in financing improvements of their facilities. Given the obvious importance of use agreements to the nation's airports, ACI-NA believes it can assist the Court in addressing the question of federal preemption of such use agreements.

It is respectfully requested, therefore, that the Court grant leave to ACI-NA to file the attached amicus curiae brief in support of the Petitions.

Respectfully submitted,

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QUESTION PRESENTED

Did the Fifth Circuit wrongly decide that the DFW International Airport's use agreement with American Airlines was preempted by the Airline Deregulation Act ("Deregulation Act"), currently codified at 49 U.S.C. §§ 41710 *et seq.*

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INTEREST OF THE *AMICUS CURIAE*

Airports Council International – North America's ("ACI-NA") members are the state, local and regional governing entities that own and operate commercial service airports in the United States and Canada.[1] ACI-NA member airports serve more than 97 percent of the U.S. domestic scheduled air passenger and cargo traffic, and essentially all U.S. scheduled international air travel. On February 1, 2000, the United States Court of Appeals for the Fifth Circuit issued a decision ("Decision"), reported as *Dallas-Forth Worth International Airport, et al. v. Department of Transportation*, 202 F.3d 788 (5th Cir., Feb. 1, 2000), which threatens to undermine the ability of airport proprietors to rely on use agreements between airport proprietors and signatory airlines. Use agreements govern the terms and conditions of the signatory airlines' use of airport facilities and are a key mechanism by which an airport proprietor allocates the limited resources of the nation's airports. Given the threat posed by the Decision to the legitimate proprietary use of such agreements, ACI-NA is well positioned to provide the Court with the perspective of the nation's airport proprietors,

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1. Pursuant to Supreme Court Rule 37.6, ACI-NA states that no counsel for any party authored these papers in whole or in part and that no person or entity, other than ACI-NA, its members and its counsel, contributed monetarily to the preparation and submission of these papers.

ACI-NA has requested, pursuant to Supreme Court Rule 37.2, the consent of all parties to ACI-NA's request to file an amicus curiae brief. As of the date of this filing, the United States Department of Justice, the City of Fort Worth, the City of San Francisco, the Dallas-Fort Worth International Airport Board, Legend Airlines, Southwest Airlines and American Airlines have granted such consent.

aiding the Court by explaining both the role of those use agreements at the nation's airports and the potential impact of undermining those agreements.

SUMMARY OF ACI-NA'S POSITION

Petitions Nos. 99-1739 and 99-1745 should be granted because the United States Court of Appeals for the Fifth Circuit decided an important question of federal law in a way that conflicts with a relevant decision of this Court. *See* Rule 10 of the Supreme Court of the United States. Specifically, the Fifth Circuit's Decision conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). In *Wolens*, the Court concluded that a contract between American Airlines and passengers which related to "routes and services" was not preempted by the Deregulation Act, since the terms of the contract were the result of free bargaining. The Fifth Circuit decision eviscerates *Wolens* by concluding that the Deregulation Act does preempt a contract between American Airlines and the Dallas-Fort Worth International Airport Board pursuant to which American Airlines agreed to offer certain interstate service at DFW International Airport and not at nearby Love Field.[2]

The potential harm from the Decision is substantial. The Decision threatens to undercut airport proprietors' abilities to exercise their proprietary power to operate their airports effectively and efficiently. It is pursuant to such proprietary power that almost every airport in the nation has in place "use agreements" which set forth the terms and conditions of the service provided by signatory airlines using the

2. This provision has been included in DFW International Airport's use agreements since the airport opened.

airport's facilities. Historically, Congress has recognized the need for such power to reside with airport proprietors. Indeed, in the Deregulation Act itself, Congress expressly declared that the Deregulation Act was not intended to preempt a state or local government's exercise of its powers as an airport owner and operator. Despite that clear statement of Congressional intent, the Fifth Circuit has now called into question, by misinterpreting the Deregulation Act in contravention of this Court's decision in *Wolens* and earlier case law, the continued ability of airport proprietors to allocate, through contract, airport facilities among potential users and rely upon the commitments in such contracts.[3]

ARGUMENT

In balancing the interests of the federal government in regulating the nation's air transport system against the rights of the owners and operators of the nation's airports, Congress has repeatedly recognized that airport proprietors have the continuing authority to manage the facilities they make available for air transportation. Thus, the Deregulation Act declares, in pertinent part, that:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a

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3. ACI-NA notes that it is concerned here with the Fifth Circuit's interpretation of the scope of the Deregulation Act as applied to use agreements, and not to the *Shelby* or *Wright* amendments impact on air carrier service at Love Field, discussed at length in the pending petitions for writ of certiorari.

> price, route, or service of an air carrier. . . . 49 U.S.C. § 41713(b).

However, the Deregulation Act then immediately qualifies that ban by stating that the preemption provision "does not limit a state [or] political subdivision . . . that owns or operates an airport served by an air carrier . . . from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3).

Here, the Fifth Circuit essentially ignored the limiting provision set forth in Section 41713(b)(3), concluding that the Dallas-Fort Worth International Airport Board's use agreement with American Airlines was preempted because it had the force or effect of an invalid local regulation relating to "routes and services" in violation of the Deregulation Act. In particular, the Fifth Circuit found invalid the following provision of the use agreement:

> Airline agrees that it shall conduct its certificated air carrier services serving the Dallas/Fort Worth area to, from and at the Airport, to the extend required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.

This provision essentially required American Airlines, in exchange for benefits contained in the use agreement, to base its interstate service for the Dallas/Fort Worth area at DFW International Airport.[4]

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4. Not all airlines operating at DFW International Airport choose to avail themselves of the various benefits and obligations of being a signatory to a use agreement. Thus, at least one such airline has historically chosen not to contract away its ability to (Cont'd)

The provision clearly has a reasonable and rational basis: it assured the viability and maximum utilization of DFW International Airport, and it provided for the efficient distribution of Dallas/Forth Worth area flights between the new DFW International Airport and the smaller Love Field. Yet, instead of deferring to the airport owner's exercise of its proprietary power to enter into such use agreements, the Fifth Circuit concluded that a contractual limit on American Airlines' ability to base interstate flights at Love Field constituted an invalid local regulation relating to "routes and services" in violation of the Deregulation Act. That conclusion squarely contradicts this Court's decision in *Wolens*. In *Wolens*, the Court concluded that a contract freely entered into by an airline, even through it related to "price, route or services," was not federally preempted by the Deregulation Act because the contract was a "privately ordered obligation[ ]" which "did not amount to a state's enactment or enforcement [of] any law." *Wolens*, 513 U.S. at pp. 228-229.

The Fifth Circuit attempted to distinguish *Wolens* in two ways. First, the Court noted that the contracting parties in *Wolens* were private parties, while the Dallas-Fort Worth International Airport Board is a public entity. Second, the Fifth Circuit argued that this Court, in *Wolens*, based its decision on the fact that "market efficiency requires effective means to enforce private agreements" while the use agreement at DFW International Airport did not serve the purpose of market efficiency since it "seems" to have been entered into "to implement an agreement between the cities

(Cont'd)
operate interstate flights both from DFW International Airport and nearby Love Field. Correspondingly, that airline does not enjoy the benefits of being a signatory airline at DFW International Airport.

to regulate airport use in the Dallas-Fort Worth area." *Dallas-Fort Worth*, 202 F.3d at p. 811.

Neither argument is compelling. The fact that the Dallas-Fort Worth International Airport Board is a public entity does not lessen the validity of its contracts under the Deregulation Act. If anything, the Deregulation Act's specific reservation of proprietary powers to a state or local entity which owns and operates an airport is an express declaration that federal law is not intended to preempt a local public entity, such as the Dallas-Fort Worth International Airport Board, which owns and operates the airport, from entering into contracts pertaining to the use of its facilities. This is especially true where the purpose underlying the contractual provision, enhancing the financial viability of the airport, is clearly a legitimate goal of the airport proprietor. The Fifth Circuit's "market efficiency" analysis is even less compelling. In *Wolens*, this Court explained:

> The stability and efficiency of the market depend fundamentally on the enforcement of agreements, freely made, based on needs perceived by the contracting parties at the time.

Wolens, 513 U.S. at p. 824. It is that very stability and efficiency which is at issue here. Not every airline which uses DFW International Airport, or indeed any airport, is necessarily a signatory to a use agreement. By signing a use agreement an airline obtains certain benefits and certain obligations it would otherwise not possess. In return, an airport proprietor incurs certain obligations and benefits. One such benefit to an airport proprietor has historically been the ability to rely on the terms of its use agreements when the airport seeks financing for airport improvement projects.

Undercutting the enforcement of such contracts, as surely the Fifth Circuit has done, undercuts the airport proprietor's ability to rely on the terms of its use agreements and maximize the benefits conferred by those agreements.

In attempting to avoid *Wolens*, the Fifth Circuit's decision also contravened the earlier federal decisions addressing the interplay between federal law and airport proprietor rights. In particular, the Second Circuit has held that, consistent with the Deregulation Act, an airport proprietor could choose which airport uses should be accommodated by which facilities within the control of the proprietor. *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 960 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (1987); *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984).

In *Western Air Lines*, the district court held (and the Court of Appeals agreed) that the Deregulation Act evidenced no congressional intent to bar generally an airport proprietor from decisions as to which of a number of airports within a single market would be available to which user groups. *Western Air Lines*, 658 F. Supp. at 957-958; 817 F.2d at p. 226. Only in the case of a regulation that has no rational basis, unfairly discriminates, or seeks to accomplish an illicit objective would the regulation be preempted. *Western Air Lines*, 658 F. Supp. at p. 958. The district court deemed it significant that the rule at issue was intended "to divert air traffic from one airport to another within the respective system . . . and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter." *Western Air Lines*, 658 F. Supp. at p. 958. In affirming, the Court of Appeals relied on the district court's conclusion that:

> A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager . . . and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest.

Western Air Lines, 817 F.2d at p. 226, citing 658 F. Supp. at p. 957.

In examining exercises of local authority based on traditional judgments about how facilities should be used, and which users should be provided access to particular facilities, the applicable test to be applied affords to the airport proprietor substantial discretion. As stated by *Western Air Lines*:

> A "decision" by the legislature should be upheld unless [the court] can say that it is wide of any reasonable mark.

Western Airlines, 658 F. Supp. at p. 960 (quoting Justice Holmes' dissent in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 (1928)). The Fifth Circuit's decision here accorded no such deference to the airport proprietor's judgment as to the appropriate allocation of services and resulting airport facilities in the Dallas/Forth Worth area. It was the allocation of just such resources which the *Western Air Lines* court recognized as a valid core interest of an airport proprietor. *Western Air Lines*, 658 F. Supp. at 952.

CONCLUSION

Based on the foregoing, ACI-NA requests that the Petitions be granted.

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